IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 12, 2006 Session

CITY OF BRENTWOOD, TENNESSEE, ET AL. v. METROPOLITAN BOARD OF ZONING APPEALS, ET AL.

Appeal from the Chancery Court for Davidson County
No. 00-4012-I Claudia Bonnyman, Chancellor

No. M2005-01379-COA-R3-CV - Filed on June 28, 2007

In this case, the City of Brentwood appealed to the Metro Board of Zoning Appeals the Metro zoning administrator's approval of a permit for a billboard on the basis it was located along a road designated as a scenic route. The board approved the permit, and the trial court denied relief under common law writ of certiorari. Brentwood also raised before the board the issue of compliance with a Metro ordinance establishing minimum distance requirements between billboards. Because of the state of the record, the trial court remanded that issue to the Board. We affirm the trial court's judgment on the scenic route issue, and we affirm the remand with modification.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

James R. Tomkins, Nashville, Tennessee; Roger A. Horner, Brentwood, Tennessee, for the appellant, City of Brentwood, Tennessee.

J. Brooks Fox, John L. Kennedy, Nashville, Tennessee; Lawrence P. Leibowitz, Rebecca G. Bond, Knoxville, Tennessee, for the appellees, Metropolitan Government and Lamar Advertising Company.

OPINION

I.

On May 10, 2000, the Metropolitan Government of Nashville and Davidson County ("Metro") issued a building/zoning permit, Number 2000-4152A, to Lamar Advertising Company ("Lamar"). The permit allowed construction of a 14 foot by 48 foot Type II billboard ("Billboard") on a parcel of property in Davidson county which borders the City of Brentwood in Williamson

County ("Brentwood"). A Type II billboard is defined by Section 17.32.150 of the Metro Zoning Ordinance ("Zoning Ordinance"). The Billboard was placed on a triangular parcel roughly bounded by Franklin Road to the west, CSX railroad tracks/Wilson Pike to the east, and Old Hickory Boulevard to the north. The Billboard is located 300 feet from Old Hickory Boulevard which is designated a scenic route in Metro's major street plan. Franklin Road and Wilson Pike run generally north and south at this location; Old Hickory Boulevard runs east and west.

On September 1, 2000, shortly after construction began on the Billboard, Brentwood filed an appeal of the issuance of the permit with the Metropolitan Board of Zoning Appeals ("Board"). Brentwood alleged that construction of the Billboard violated the Zoning Ordinance. Brentwood asserted that the Billboard violated M.C.L. § 17.32.150 B.13, which prohibits placement of a billboard "along" a street or highway which has been designated a "scenic route" on Metro's major street plan.[1] Brentwood's appeal questioned the Zoning Administrator's "decision to issue a permit for a billboard oriented toward OH [Old Hickory] Boulevard." No other ground for the appeal was cited by Brentwood.

On October 30, 2000 the Brentwood City Manager wrote the Board about its appeal. The letter reiterated Brentwood's position that the permit violated M.C.L. § 17.32.150 B.13 regarding scenic roads. Brentwood did not note its objection to the permit on any other grounds.

The Zoning Administrator, Lon West, in a letter dated November 2, 2000, to the Board provided his reasoning for approving the permit:

> My decision to issue this permit was based on the sign's orientation. The billboard is oriented to Franklin Pike. Orientation has to be the driving factor, since the ordinance does not specify how far from a scenic route the sign must be. "Along" is a subjective term in which no definition is offered in the Code.

The Board heard the appeal on November 2, 2000. While a transcript is normally made of such proceedings, the recorder used was damaged, resulting in an inaudible recording. In lieu of a transcript, the Board's secretary prepared a narrative of the proceeding which became part of the Board's record ("Narrative"). It does not appear that the Board approved the Narrative.[2] The Narrative's "Case History," reciting the procedural background, notes Brentwood's objection as resting upon whether the Billboard is "along" a scenic route.

The Narrative's recitation of the evidence presented to the Board provides as follows:

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[1] M.C.L. § 17.32.150 B.13 provides as follows:

> No billboard shall be permitted along any public street or highway that has been designated as a scenic route in the adopted major street plan of the Metropolitan Government.

[2] The parties' briefs submitted to this court asserted that the Narrative was compiled with the cooperation and agreement of all parties.

APPELLANTS' [BRENTWOOD'S] PRESENTATION

Mr. Michael Walker, City Manager, Mr. Robert H. Jennings, Attorney for the City of Brentwood, and Mr. Edward C. Owens AICP with Gresham, Smith and Partners presented the case for the City of Brentwood. Mr. J. Allen Crawford, licensed as a professional land surveyor in the State of Tennessee, submitted a survey into evidence on behalf of the City of Brentwood.

Mr. Walker [Brentwood City Manager] testified as to the following:
(1) That the City of Brentwood adopted the Franklin Road Corridor Plan in 1994.
(2) That the purpose of the Franklin Road Corridor Plan was to beautify Franklin Road, which is the "Main street" of Brentwood and the primary entrance into the community from Old Hickory Boulevard.
(3) That the billboard in dispute was constructed on the Nashville/Davidson County and Brentwood/Williamson County border and was in direct conflict with the goals and objectives of the Franklin Road Corridor Plan.
(4) That the visibility of the billboard was primarily oriented and angled to attract the attention of drivers and traffic on Old Hickory Boulevard heading westbound toward Franklin Road. Photographs were submitted to the [Board] to support this contention.
(5) That the northerly face of the billboard was prominently oriented to traffic entering Old Hickory Boulevard from the I-65 South exit ramp. Photographs were submitted to the [Board] to support this contention.
(6) That the curvature of the Old Hickory Boulevard roadway from east to west placed the northerly face of the billboard clearly in the line-of-sight of motorist traveling west as they crossed the I-65 overpass approaching Franklin Road. Photographs were submitted to the [Board] to support this contention.
(7) That the billboard was prominently visible to traffic on Old Hickory Boulevard waiting at the Franklin Road/Old Hickory Boulevard traffic signal. Photographs were submitted to the [Board] to support his contention.
(8) That his position is that the permit for the billboard was issued in violation of Section 17.32.150, Item 13 of the Metro Zoning Ordinance which prohibits billboards along any street designated as a scenic route in the adopted major route plan of the Metropolitan Government.

(9) That the relevant section of Old Hickory Boulevard is a designated scenic route under the major route plan.
(10) That the location of the billboard was in conflict with the minimum distance requirements for spacing of billboards on the same side of a public street as required in Section 17.32.150, item 7 of the Municipal Code of Laws.
(11) That an existing non-conforming billboard located on the southwest corner of Old Hickory Boulevard and Wilson Pike Circle intersection is within the same block as the new billboard and the location of the new billboard violates the minimum separation distance of 1,000 feet.
(12) That no street separates the two billboards in question.

Mr. Jennings [attorney for Brentwood] argued as to the following:

(1) That if the sign could be seen from any vantage point from a scenic route, it would be prohibited by Section 17.32.150 item 13.
(2) That the word "along" included being able to observe the sign from any vantage point on the scenic route.

Mr. Owens [from Gresham, Smith & Partners] testified as to the following:

(1) The Metro Code of Laws Section figures 17.32.150-1 and 17.32.150-2 and related sections that referred to the section figures attempt to establish a distance requirement.
(2) That as a past employee of the Metropolitan Planning Commission, he served as project manager when the current sign regulations were drafted, and that "along" included being able to observe the sign from any vantage point on the scenic route.
(3) That the Metropolitan Zoning Regulations clearly state that billboards are prohibited along any public street or highway designated as a scenic route by Metro's adopted major street plan.
(4) That Metro's adopted major street plan designates Old Hickory Boulevard as a scenic arterial.
(5) That Mr. Crawford's survey shows that the subject property has frontage along Old Hickory Boulevard.
(6) That the zoning Regulations do not specifically define "along" and that the spirit and intent of the provision is to protect the visual quality of the community's scenic corridors.
(7) That there are no legally complying billboards along the Old Hickory scenic arterial because of that provision in the code.
(8) That the photographs presented by Mr. Walker clearly show that the billboard is very visible from Old Hickory Boulevard even at a

distance of three hundred feet, and therefore the billboard violates the spirit and intent of the Metropolitan Code of Laws.
(9) That the billboard violates M.C.L. Section 17.32.150, subsection 7 related to spacing between billboards located on the same side of a public street and referenced Figures 17.32.150-1 and 17.32.150-2.
(10) That the existing billboard along Old Hickory Boulevard, immediately west of the CSX railroad probably predated the current Zoning Regulations and is therefore legally non-complying.

PROPONENTS OF ZONING ADMINISTRATOR'S DETERMINATION PRESENTATION

The following persons testified in support of the Zoning Administrator's interpretation on behalf of Lamar Advertising Company. Mr. Joe McDowell, General Manager of Lamar Advertising Company, Nashville, Tennessee Office, testified in support of the Zoning Administrator's interpretation and decision to issue a permit for the erection of the billboard. Mr. Lawrence P. Liewbowitz, Esquire, appeared as counsel for Lamar Advertising, and Mr. Jim Britt, Real Estate Manager for Lamar also appeared in support.

Lamar Advertising Company and its counsel testified, argued and/or presented evidence as to the following:[3]

(1) That the permit that was issued to Lamar Advertising Company to erect the billboard was issued for a sign location on Franklin Pike.
(2) That the billboard is oriented to Franklin Pike, and that it is not oriented to Old Hickory Boulevard.
(3) That the sign structure was erected prior to the appeal filed by the city of Brentwood.
(4) That the term, "orientation" as used in the outdoor advertising industry, is defined with regard to the direction of traffic from which the structure is intended to be viewed, and does not necessarily include an adjacent roadway.
(5) That the billboard structure is oriented toward Franklin Pike, as it was erected with the intent that individuals traveling on Franklin Pike could view messages contained on the structure.
(6) That the billboard structure does not have a sign face on the opposite side, which could only be read from Old Hickory Boulevard.

[3] It should be noted that the Narrative fails to differentiate between evidence and argument on behalf of the administrator's decision, which makes reliance on facts presented by Lamar problematical at best.

The Board upheld the issuance of the permit. The Board found the Billboard was not "along" a scenic highway, Old Hickory Boulevard. According to the Board, the term "along" as used in M.C.L. § 17.32.150 B.13 means oriented toward oncoming traffic. Since the Billboard faces Franklin Pike, and not Old Hickory Boulevard, then it is not a Billboard "along" a scenic highway. The Board found the permit was properly issued. In the Narrative explaining the Board's "Review and Decision," the Board did not address Brentwood's second issue raised at the hearing, namely, whether the Billboard was too close to an existing billboard on the same side of the street in violation of M.C.L. § 17.32.150 B.7. (*See* testimony of Walker, paragraphs (10), (11), and (12), *supra*, and Owens testimony, paragraphs (9) and (10), *supra*).

As a result of the Board's action, Brentwood and four individual property owners filed a Petition of Writ of Certiorari in Davidson County in December of 2000 to challenge the Board's decision. The petitioners alleged the Board's approval of the permit violated M.C.L. § 17.32.150 B.13 since it allowed a billboard along a scenic road. Brentwood named Metro and the Board. Lamar intervened. Metro, the Board, and Lamar moved to dismiss the petition alleging Brentwood and the individual petitioners lacked standing to object to the Board's actions. The trial court granted the motion and dismissed the petition for lack of standing. On appeal before this court, we found that while the individual property owners lacked standing, Brentwood, on the other hand, had standing to challenge the Board's decision. *City of Brentwood v. Metro. Board of Zoning Appeals*, 149 S.W.3d 49 (Tenn. Ct. App. 2004).

After remand, in January of 2005 Brentwood moved to amend its Petition for a Writ of Certiorari to add a second ground to challenge the Board's decision, namely that the Billboard violated M.C.L. § 17.32.150 B.7 prohibiting two billboards within 1000 feet on the same side of the street. Lamar and Metro opposed the amendment since, among other reasons, this objection to the permit was not effectively raised before the Board. The trial court granted Brentwood's motion to amend on February 4, 2005.

The trial court then reviewed the Board's decision on April 8, 2005. The court ruled that the Board did not act illegally or arbitrarily in how it defined "along" in the ordinance. Consequently, the trial court found, the Board's decision did not violate M.C.L. § 17.32.150 B.13. As to the second ground raised by Brentwood, the court found that it could not rely on the Narrative since it was admittedly incomplete and a small deviation in the Narrative from what was presented could be outcome determinative. Furthermore, relying by analogy on Rule 24 of the Tennessee Rules of Appellate Procedure, the trial court found that the Board should have adopted the Narrative. At the hearing itself, the trial court found:

> So I'm going to find that because the narrative is insufficient, and because it's the board's duty to supply a correct transcript, and because the actual words that were stated at the hearing may well determine the outcome of the hearing as regards 17-32-150(b)(7), the best I can do is to send it back to the board for a hearing on that issue.

On this issue, the trial court's order remanded the matter to the Board in order "to determine whether there was a preexisting billboard which would preclude the issuance of a permit for the construction of the billboard in the present case."

II.

The Tennessee General Assembly has delegated to local governments, with some limitations, the authority to regulate use of private property through zoning ordinances. *Lafferty v. City of Winchester*, 46 S.W.3d 752, 757-58 (Tenn. Ct. App. 2001); *see also Draper v. Haynes*, 567 S.W.2d 462, 465 (Tenn. 1978). The powers to enact and amend zoning regulations governing the use of land that are delegated to local legislative bodies are broad. *Fallin v. Knox County Bd. of Com'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). The General Assembly has also delegated to local officials the authority to apply and enforce zoning ordinances. *See e.g.*, Tenn. Code Ann. §§ 13-7-109 (establishing the powers of county boards of zoning appeals); 13-7-110 (providing for county building commissioner and for the enforcement of zoning regulations through the withholding of building permits); and § 13-7-111 (describing modes of enforcement and penalties for violation).

The original decision at issue in this case is the zoning administrator's decision to issue a permit for the construction of the Billboard based on his interpretation of the applicable Metro zoning ordinance. Brentwood appealed the Zoning Administrator's decision to the Metro Board of Zoning Appeals. Appeals of an administrator's determination to the local Board of Zoning Appeals are authorized by Tenn. Code Ann. § 13-7-207(1), which gives such boards the power to:

> Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirements, permit, decision, or refusal made by the municipal building commissioner or any other administrative official in the carrying out or enforcement of any provision of any ordinance enacted pursuant to this part and part 3 of this chapter;

After the Board affirmed the Zoning Administrator's decision to issue the permit allowing construction of the Billboard, Brentwood sought judicial review.

Deciding whether a particular situation meets the requirements of a zoning ordinance is an administrative function, quasi-judicial in nature. *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990), *citing Mullins v. City of Knoxville*, 665 S.W.2d 393, 396 (Tenn. Ct. App. 1983); *Hutcherson v. Lauderdale County Bd. of Zoning Appeals*, 121 S.W.3d 372, 376 (Tenn. Ct. App. 2003); *Thompson v. Metro. Gov't of Nashville and Davidson County*, 20 S.W.3d 654, 659 (Tenn. Ct. App. 1999) (stating that the decision to issue or not to issue a building permit is an administrative decision). Decisions of zoning boards are administrative or quasi-judicial decisions that involve applying the facts of the situation before the board to the applicable ordinance or requirement, *i.e.*, enforcing, applying, or executing a law already in existence. *Weaver v. Knox County Bd. of Zoning Appeals*, 122 S.W.3d 781, 784 (Tenn. Ct. App. 2003); *Wilson County Youth Emergency Shelter, Inc. v. Wilson County*, 13 S.W.3d 338, 342 (Tenn. Ct. App. 1999).

Consequently, the proper vehicle by which to seek judicial review of decisions of the local Board of Zoning Appeals, and to review administrative or quasi-judicial as opposed to legislative decisions, is the common law writ of certiorari. Tenn. Code Ann. § 27-8-101 (providing that the writ may be granted where an inferior tribunal, board, or officer exercises judicial functions); *Fallin*, 656 S.W.2d at 342-43; *McCallen*, 786 S.W.2d at 640; *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 57 (Tenn. Ct. App. 2004); *Weaver*, 122 S.W.3d at 784; *Lafferty*, 46 S.W.3d at 758; *421 Corp. v. Metro. Gov't of Nashville*, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000); *Hoover, Inc. v. Metro. Bd. of Zoning Appeals,* 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997).

Under the limited standard of review in common law of writ of certiorari proceedings, courts review a lower tribunal's decision only to determine whether that decision maker exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. *Petition of Gant*, 937 S.W.2d 842, 844-45 (Tenn. 1996), quoting *McCallen*, 786 S.W.2d at 638; *Fallin*, 656 S.W.2d at 342-43; *Hoover Motor Exp. Co. v. Railroad & Pub. Util. Comm'n.*, 195 Tenn. 593, 604, 261 S.W.2d 233, 238 (1953); *Lafferty*, 46 S.W.3d at 758-59; *Hoover, Inc.,* 955 S.W.2d at 54; *Hemontolor v. Wilson Co. Bd. of Zoning Appeals*, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994).

Under the certiorari standard, courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997); *Powell v. Parole Eligibility Rev. Bd*., 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994); (2) reweigh the evidence, *Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980); *Hoover, Inc. v. Metro Bd. of Zoning App*., 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996); or (3) substitute their judgment for that of the lower tribunal. *421 Corp.*, 36 S.W.3d at 474. It bears repeating that common law writ of certiorari is simply not a vehicle which allows the courts to consider the intrinsic correctness of the conclusions of the administrative decision maker. *Powell*, 879 S.W.2d at 873; *Yokley v. State*, 632 S.W.2d 123, 126 (Tenn. Ct. App. 1981).

In reviewing local land use decisions, "the court's primary resolve is to refrain from substituting its judgment for that of the local governmental body." *McCallen*, 786 S.W.2d at 641. Public policy favors permitting the community decision-makers closest to the events, who have been given broad powers in the area, to make zoning and land use decisions. Consequently, courts give wide latitude to local officials who are responsible for implementing zoning ordinances, are hesitant to interfere with zoning decisions, and will refrain from substituting their judgments for that of the local governmental officials. *Lafferty*, 46 S.W.3d at 758; *Hoover, Inc.*, 955 S.W.2d at 54; *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992). "The meaning of a zoning ordinance and its application to a particular circumstance are, in the first instance, questions for the local officials to decide." *Whittemore*, 835 S.W.2d at 16; *see also 421 Corp.*, 36 S.W.3d at 474-75.

III.

The Zoning Administrator explained his decision as based on the orientation of the Billboard, *i.e.*, which road it faces. Keeping in mind that Franklin Pike is perpendicular to Old Hickory Boulevard at the location at issue, that explanation was that the "billboard is oriented to Franklin Pike. Orientation has to be the driving factor, since the ordinance does not specify how far from a scenic route the sign must be."

The Board made the same findings: that the term "along" as used in the ordinance means oriented toward oncoming traffic and that the Billboard was oriented toward Franklin Pike and not Old Hickory Boulevard. Accordingly the Board determined that the permit was properly granted by the administrator. The trial court found the interpretation by the Board to be reasonable, not arbitrary or capricious and, applying the appropriate standard of review, denied relief.

On appeal, Brentwood asserts that the real question presented by this appeal is the meaning of the word "along" as used in the relevant portion of the Metro Zoning Ordinance. Brentwood argues, variously, that the Board's definition is inconsistent with the dictionary definition that is required to be followed; that the Billboard is visible to traffic on Old Hickory; and that the Board's interpretation of "along" defeats the purpose of the ordinance, which is to reduce the amount of visual clutter in the vicinity of a scenic route. Consequently, Brentwood argues, the Board acted illegally even if its interpretation was reasonable. Finally, Brentwood argues that the Billboard is, under the facts of this case, "oriented" toward the scenic route, Old Hickory Boulevard, even though it may also be oriented toward Franklin Pike.

The ordinance at issue prohibits the erection of billboards along a street designated as a scenic route. Nothing in the ordinance establishes any other restriction. In other words, there is no requirement that billboards along a different kind of street be located a minimum distance from a scenic route. Neither is there any requirement that no billboard be visible from all parts of a scenic route. Such a requirement would necessarily present enforcement and application problems, especially where a scenic route passes through densely developed areas with a number of streets.

The only restriction at issue on the placement of a billboard, then, is that one cannot be placed "along" a scenic route. The Zoning Administrator and the Board determined that the ordinance prohibits billboards that are oriented toward traffic traveling along the scenic route. The Billboard at issue faces traffic traveling along Franklin Pike, not traffic traveling east and west on the scenic route, Old Hickory Boulevard. The fact that the Billboard is visible from some points along Old Hickory does not change the central point: a billboard is oriented in a particular direction.

Brentwood relies on a definition from Webster's Unabridged Dictionary[4] which defines "along" as, *inter alia*, "in a line parallel with the length or direction of . . . or on a line through the

[4]According to the Metro Zoning Ordinance, words in the ordinance are to be interpreted as defined therein or, where not defined, by using the definition found in the most current edition of Webster's Unabridged Dictionary.

center or central axis of . . . - distinguished from across . . .” Whether or not this definition is the most applicable, we do not find that it conflicts with the Board’s interpretation. The definition simply does not address, in this context, the orientation of a sign or billboard.

We are not convinced in any event that resort to dictionary definitions is necessary even if it were helpful. The concept of a billboard being located along a road is neither complicated nor technical.

The Narrative of the Board’s hearing and deliberation on Brentwood’s objection to the Billboard reveals the following:

> The Board considered all testimony, arguments, and evidence, including the letter of the ZA. The Board then reviewed the Metropolitan Code of Laws relevant to the appellants’ arguments. The Board presented various hypothetical scenarios to the appellants regarding how far would be far enough and what appellants based their answer on. The Board presented.
>
> Based on the Metropolitan Code, the opinion of the ZA and the arguments and evidence presented by the appellants, the Board made the following findings of fact:
>
> 1. The billboard is oriented toward Franklin Pike.
>
> 2. The billboard in question is over 300 feet from the scenic route, with a building between the billboard and the scenic route.
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> Based on the Metropolitan Code, the opinion of the ZA and the arguments and evidence presented by the appellants, the Board made the following conclusions of law:
>
> 1. Billboards are not required to be invisible from a scenic route.
>
> 2. There are no other instances in the billboard provisions in the MCL that suggest that if the sign could be seen from any vantage point from a scenic route, it would be prohibited by Section 17.32.150 item 13, or that the word “along” included being able to observe the sign from any vantage point on the scenic route, even when there are clear spacing guidelines in the MCL.
>
> 3. The meaning of the term “along” in the MCL, based on plain meaning of the language of that section and the other relevant sections most clearly means oriented toward oncoming traffic.
>
> 4. The MCL contains no distance requirements for billboards along scenic routes.

> Based on the findings of fact and conclusions of law, the Board upheld the ZA's issuance of the billboard permit finding that the ZA had not been in error or acted arbitrarily in issuing the permit.

While local zoning officials must act within the authority granted to them and may not make decisions that contravene ordinances passed by the local legislative body, the Board's actions herein were clearly within its authority, and its interpretation was consistent with the legal principles governing it. Accordingly, we find nothing "illegal" about the Board's interpretation and actions.

Additionally, we agree with the trial court that the Board's decision was not arbitrary. "An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *Jackson Mobilphone Co,. v. Tennessee Public Serv. Comm'n*, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993). The Board's reasoning set out above demonstrates that its decision was based upon a reasonable interpretation of the ordinance that took into account the circumstances. The Board's interpretation has the additional virtue of being supported by common sense.

Based on the appropriate standard of review and the record in this case, we affirm the trial court's denial of relief under the common law writ of certiorari because the Board did not exceed its jurisdiction, act arbitrarily or capriciously, or disregard the applicable legal principles in determining that the Billboard was not along a scenic route.

IV.

Brentwood also objects to the Billboard on the basis it is located too close to an existing billboard in violation of the 1000 foot rule in M.C.L. § 17.32.150 B.7 of the Metropolitan Code of Laws. The trial court herein found the record insufficient "for the Court to determine whether there was a pre-existing billboard within 1,000 feet of the billboard which is the subject of this case" and remanded the matter to the Board "for a further hearing . . . for the determination of whether there was such a preexisting billboard at the time of the issuance of the permit in this case which would violate the provisions of M.C.L. § 17.32.150 B.7 of the Metropolitan Code of Laws."

Lamar argues that there is virtually no evidence in the record that there is another preexisting billboard on the same side of the street as, and within 1000 feet of, the Billboard. However, the narrative provided by the Board states that Brentwood's city manager testified that the Billboard was in conflict with the minimum spacing requirement of M.C.L. § 17.32.150 because "an existing non-conforming billboard located on the southwest corner of Old Hickory Boulevard and Wilson Pike Circle intersection is within the same block as the new billboard and the location of the new billboard violates the minimum separation distance of 1,000 feet." While this testimony may not be specific or concrete enough to sustain a finding of a violation, it at least makes clear the issue was put in dispute.

Lamar also argues that there is no pre-existing billboard within 1000 feet of the Billboard that is the subject of this appeal "as determined by the Metropolitan Zoning Administrator whose findings have been upheld by the Metropolitan Board of Zoning Appeals." However, there is nothing in the record to indicate that the Zoning Administrator made any finding with regard to the distance requirement. There is simply insufficient evidence in this "narrative" record as to the facts of the location of the billboards.

The Board's order in this case does not address the issue regarding the proximity of another billboard. Consequently, the trial court was precluded from conducting a review of the Board's decision on that issue in this common law writ of certiorari action. While it can be argued that the Board's approval of the permit for the Billboard is what was subject to judicial review, it is not clear that the pre-existing billboard issue was, in fact, part of the Board's decision.

Brentwood's original petition for writ of certiorari was based solely on the "along a scenic route" argument discussed above. It was only after the first appeal in this case and this court's remand that Brentwood sought to amend its petition to add an additional objection to the Board's approval of the permit: that the Billboard violated Metro's ordinance prohibiting two billboards within 1000 feet of each other on the same side of the street. This request was made more than four years after the original petition was filed and after the Board's decision to approve the permit and affirm the action of the Zoning Administrator.

The Board argues that the trial court erred in allowing Brentwood to amend its petition for certiorari because the 1000 foot distance requirement was not properly before the Board. When Brentwood applied to the Board for reversal of the Zoning Administrator's approval of the permit it alleged only a violation of the scenic route provision. The application did not mention the 1000 foot distance requirement, did not allege a violation of that provision, and did not allege any facts relevant to that requirement. The letter from Brentwood's city manager sent a month later to the Board stated the reason for the appeal was the alleged violation of the scenic route provision. No other ground for the appeal was stated and no allegation made regarding the 1000 foot requirement. Consequently, we agree with the Board that the alleged violation of the 1000 foot rule was not raised by Brentwood before the hearing.

That fact alone does not dispose of the matter. In its brief, the Board states:

> Brentwood raised the issue regarding a violation of M.C.L. § 17.32.150 B7 (the 1000-foot-distance requirement) for the first time, verbally, on the day of the MBZA hearing. Because these new allegations had not appeared in Brentwood's application nor the letter from the city manager, there had been no updated field inspection by the zoning administrator's staff, no staff report, and no testimony from the staff regarding the 1000-foot-distance requirement.

> As a result, the MBZA did not address the issue of the 1000-foot-distance requirement since it was not part of its pleadings and thus not properly before the Board.

Some of this explanation goes beyond the record before us, but three basic points are obvious from the record: (1) Brentwood did not raise the issue before the hearing, (2) the Board did not address the issue in its order, and (3) Brentwood's witnesses made some reference to the 1000-foot distance requirement.

Unfortunately for the Board's argument, the record does not reveal why the Board did not rule on the 1000-foot distance requirement issue. In other words, the Board did not specifically decline to rule on the issue because it had not been raised. Additionally, the Board has not presented us with any policy, rule, or other authority that would either preclude Brentwood from asking the Board to consider the issue or prevent the Board from waiving any timeliness problem or failure to provide sufficient notice.

In its brief, the Board also argues that if Brentwood had sought permission from the Board to amend its application for Board review of the Zoning Administrator's decision, and if the Board had allowed the amendment and given the Zoning Administrator the opportunity to respond, then the issue of compliance with the 1000-foot distance requirement could appropriately have been included in the petition for writ of certiorari. Implicit in this argument is the suggestion that the record would have included proof on the issues from Metro's zoning staff as well as the Board's resolution of the factual dispute.

The Board argues that the situation reflected in the record should have resulted in a denial of Brentwood's motion to amend its petition for writ of certiorari for two reasons. First, Brentwood's attempt to raise the 1000-foot distance requirement constituted an attempt to combine an original cause of action with the certiorari action which is prohibited. *Goodwin v. Metro Bd. of Health*, 656 S.W.2d 383, 386 (Tenn. Ct. App. 1983). We do not agree that the principle in *Goodwin* applies herein, especially if the issue was before the Board for decision.

Second, the Board argues that by ordinance Brentwood had thirty days after commencement of construction to appeal the Zoning Administrator's decision; the Zoning Administrator approved the permit on May 10, 2000; construction began on or around September 1; and by the date of the hearing, November 2, the Billboard's construction was completed. However, again, nothing in the record indicates that the Board refused to hear the issue, waived the timeliness problem, or simply ignored the question.

We agree with the trial court that judicial review of the issue of compliance with the 1000-foot distance requirement is not possible and remand to the Board is necessary. However, the remand order should be modified. On remand, the Board should first decide whether Brentwood's allegation of a violation of M.C.L. § 17.32.150 B.7 was properly or timely raised. If the Board determines that the issue was properly before it, or if the Board determines it has the authority to

waive the time limitation or notice requirement for appeal of that issue and decides to waive it, then the Board should proceed to determine the merits of the issue.

V.

The trial court's judgment is affirmed as modified. The matter is remanded to the Board of Zoning Appeals for further proceedings in accordance with this opinion. Costs on appeal are taxed one-half to the appellant, City of Brentwood, and one-half to the appellees, the Metropolitan Board of Zoning Appeals and Lamar Advertising, to be divided equally.

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PATRICIA J. COTTRELL, JUDGE